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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERWIN G. KRASNOW
RAUL R. RODRIGUEZ
National Association of Broadcasters
1771 N St., N.W.
Washington, D.C. 20036
(202) 293-3560

Attorneys for Petitioner
National Association
of Broadcasters

MICHAEL S. HORNE
DONNA M. MURASKY
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioners Hubbard Broadcasting, Inc., Midwest Television, Inc., Post-Newsweek Stations, Inc., and John Blair & Company

SAMUEL MILLER
MILLER AND FIELDS
1901 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-2700

Attorney for Petitioner Malrite T.V. of New York, Inc.

ARTHUR B. GOODKIND
KOTEEN & BURT
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 467-5700

Attorney for Petitioner McGraw-Hill Broadcasting Company, Inc.

JAMES A. MCKENNA, JR.
ROBERT W. COLL
STEVEN A. LERMAN
DENNIS P. CORBETT
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Attorneys for Petitioner American Broadcasting Companies, Inc.

GEORGE VRADENBURG III
HARRY R. OLSSON, JR.
CBS INC.
51 West 52 Street
New York, New York 10019
(212) 975-4321

Attorneys for Petitioner CBS Inc.

JEROME J. SHESTACK
R. CLARK WADLOW
SCHNADER, HARRISON, SEGAL & LEWIS
1111 Nineteenth Street, N.W.
Washington, D.C. 20006
(202) 463-2900

Attorneys for Petitioner National Broadcasting Company, Inc.

J. LAURENT SCHARFF
MARK J. TAUBER
JACK N. GOODMAN
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Attorneys for Petitioner Association of Independent Television Stations, Inc.

LEE M. MITCHELL
TOM W. DAVIDSON
SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 624-9000

Attorneys for Petitioner Field Communications Corporation

THOMAS J. DOUGHERTY
PRESTON R. PADDEN
METROMEDIA, INC.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016
(202) 244-5151

Attorneys for Petitioner Metromedia, Inc.

DAVID H. LLOYD
ROBERT ALAN GARRETT
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-3600

Attorneys for Petitioner Commissioner of Baseball

PHILIP HOCHBERG
VORYS, SATER, SEYMOUR AND PEASE
1828 L Street, N.W.
Suite 1111
Washington, D.C. 20036
(202) 822-8200

Attorney for Petitioners National Basketball Association and National Hockey League

QUESTIONS PRESENTED FOR REVIEW

1. Does the Copyright Act of 1976 repeal by implication the authority the Federal Communications Commission (FCC) would otherwise have under the Communications Act of 1934 to adopt rules relating to cable television retransmission of broadcast signals which would require cable television systems to bargain competitively for the right to exhibit television programs?

2. In view of the fact that Congress enacted the Copyright Act of 1976 in light of and with reliance upon the existing FCC distant signal and syndicated program exclusivity rules for cable television, does the FCC's subsequent repeal of these rules without adoption of an alternative regulatory scheme undermine the purposes of, and therefore violate, the Copyright Act, the Communications Act or both?

3. In abruptly terminating existing contractual rights representing investments of hundreds of millions of dollars, did the agency act consistent with the prior decisions of this Court?

PARTIES TO THE PROCEEDING

The following parties are Petitioners herein and were either petitioners or intervenors aligned with petitioners in the court below: The National Association of Broadcasters; Hubbard Broadcasting, Inc.; Midwest Television, Inc.; Post-Newsweek Stations, Inc.;[i] John Blair & Company; Malrite T.V. of New York, Inc.;[ii] McGraw-Hill Broadcasting Company, Inc.;[iii] American Broadcasting Companies, Inc.; CBS Inc.; National Broadcasting Company, Inc.;[iv] Association of Independent Television Stations, Inc.; Field Communications Corporation;[v] Metromedia, Inc.; Commissioner of Baseball; National Basketball Association; and National Hockey League.

The following parties were aligned with Petitioners in the court below, but have not joined as parties to this Petition: Taft Broadcasting Company; Storer Broadcasting Company; Springfield Television Corporation; Delta Television Corp.; Evans Broadcasting Corp.; Gaylord Broadcasting Company; National Football League; Jet Broadcasting Company, Inc.; Motion Picture Association of America; Omega Communications, Inc.; Cedar Rapids Television Co.; Gilmore Broadcasting Corp.; Jefferson-Pilot Broadcasting Co.; Jefferson-Pilot Broadcasting Co.

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[i] Washington Post Co. is the parent company of Post-Newsweek Stations, Inc.

[ii] Malrite Communications Group, Inc. is the parent company of Malrite T.V. of New York, Inc.

[iii] McGraw-Hill, Inc. is the parent company of McGraw-Hill Broadcasting Company, Inc.

[iv] RCA Corporation is the parent company of National Broadcasting Company, Inc.

[v] Field Enterprises, Inc. is the parent company of Field Communications Corporation.

of Virginia; KHQ, Inc.; KTVE, Inc.; WALB-TV, Inc.; WJHG, Inc.; Bahia de San Francisco Television Co.; Forward Communications Corporation; Futura Communications Corporation; Guaranty Broadcasting Corporation; John H. Phipps Broadcasting Stations, Inc.; K-Six Television, Inc.; May Broadcasting Co.; Park Broadcasting Inc.; Plains Television Corp.; Ralph C. Wilson Industries, Inc.; Retlaw Enterprises, Inc.; Service Broadcasters, Inc.; Seven Hills Television Co., Inc.; Shamrock Broadcasting Company, Inc.; Southern Television Corp.; Spanish International Communications Corp.; Studio Broadcasting System Division of Highwood Service, Inc.; Summit Radio Corporation; Telecorpus, Inc.; WICS-TV, Inc.; Wilson Communications, Inc.; Winnebago Television Corp.; WIXT Television, Inc.; WKRG-TV, Inc.; Ziff-Davis Broadcasting Company; and Tribune Company.

Respondents to this Petition are the Federal Communications Commission and the United States of America. Aligned with Respondents in the court below were intervenors National Cable Television Association, Inc.; Community Antenna Television Association, Inc.; Allen's TV Cable Service, Inc.; United Video, Inc.; American Video Corp.; Asbury and James TV Cable Service; Audubon Electronics, Inc.; Better Cable TV; Brownwood TV Cable Service, Inc.; Cablevision of Pennsylvania, Inc.; Cass Community Antenna TV; CATV General Corporation; Central Communications Corp.; Chattanooga Cable TV Co.; Clearview Cable Corp. of South Carolina; Community Cablevision Corp.; Coosa Cable Company; Corsicana Cable TV Co.; Daniels Properties, Inc.; Dorate, Inc.; Greater Media, Inc.; Harmon and Company; Hawaiian Cable Vision Corp.; Hill City Cable TV Company; Hurley Cable TV, Inc.; Intertie, Inc.; Lakeview TV, Inc.; Landmark Cablevision As-

sociates; Lynn County CATV, Inc.; Maine Cable Television, Inc.; McDonald Group, Inc.; Pearson Cable TV Antenna System, Inc.; Piggott Video Cable, Inc.; Pinebelt Cablevision, Inc.; Rockford Cablevision, Inc.; Schuylkill Valley Trans-Video Corp.; Shen-Heights TV Associates, Inc.; Snyder Community Antenna Television, Inc.; Sweetwater Television Co.; Telecommunications, Inc.; Television Enterprises, Inc.; Tele-View, Inc.; TOCOM, Inc.; Total Television, Ltd.; Transcable, Inc.; Twin County Trans-Video, Inc.; UA-Columbia Cablevision, Inc.; United Cable Television Corporation; Valley Antenna Systems, Inc.; Vandalia Cable TV Co., Inc.; and Wood River Cable-Vision, Inc.

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OPINIONS BELOW

The Report and Order of the Federal Communications Commission, reported as *Report and Order in Docket Nos. 20988 and 21284,* 79 F.C.C.2d 652 (1980), is reproduced in the Supplemental Appendix. The opinion of the Court of Appeals, reported at ____ F.2d ____ (2d Cir. 1981), is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory provisions — Sections 111(c) and (d), 301 and 801(b) of the Copyright Act of 1976, and Sections 1, 303, 307, 325 and 330 of the Communications Act — are set out in Appendix A. The agency regulations repealed by the FCC's decision are set out in Appendix B.

STATEMENT OF THE CASE

1. *Introduction*

This case poses fundamental issues regarding the authority of the FCC to adopt rules regulating the competitive relationship between two multi-billion dollar industries, cable television and television broadcasting, the "principal source of information and entertainment for a great part of the Nation's population." *United States* v. *Southwestern Cable Co.*, 392 U.S 157, 177 (1968).

Petitioners seek review of a judgment of the United States Court of Appeals for the Second Circuit upholding a decision by a four member majority of the FCC that constitutes, in the words of the lower court, "a major reversal of its regulatory policy. . . ." App. C at 2c. That reversal repeals longstanding agency rules regulating the retransmissions by cable television systems of programming broadcast by television stations. *Report and Order in Docket Nos. 20988 and 21284*, 79 F.C.C.2d 652 (1980) (*"Report"*).[1]

The rules in question are commonly known as the "syndicated program exclusivity" and "distant signal" rules. The former, 47 C.F.R. §§ 76.151-76.161 (1980), allowed local television broadcast stations to insure that

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[1] The *Report* followed an informal, notice-and-comment rulemaking proceeding initiated by a *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284*, 71 F.C.C.2d 1004 (1979) (*"1979 Notice"*). Previously, the agency conducted two separate inquiries resulting in two FCC staff reports that were the predicate for the consolidated rulemaking proceeding. *Notice of Inquiry in Docket No. 20988*, 61 F.C.C.2d 746 (1976); *Notice of Inquiry in Docket No. 21284*, 65 F.C.C.2d 9 (1977); *Report in Docket No. 20988*, 71 F.C.C.2d 951 (1979); *Report in Docket No. 21284*, 71 F.C.C.2d 632 (1979).

cable systems did not import from "distant" stations broadcasts of syndicated programs when local stations had purchased exclusive television exhibition rights to those programs.[2] The latter, 47 C.F.R. §§ 76.59(b)-(e), 76.61(b)-(f), & 76.63 (1980), limited the number of signals from distant stations that a cable system could retransmit to its subscribers.[3]

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[2] So-called "syndicated programming" consists of recorded television programs distributed by independent producers or distributors for broadcast by different television stations in different areas or "television markets" throughout the country at such times and with (or without) such commercial sponsorship as each local station may arrange for its broadcasts. It is thus different from "local programming" produced by the station which broadcasts it, from "network programming," which is distributed for simultaneous broadcast by a number of stations by a single originator (such as ABC, CBS or NBC) that typically obtains all or most of the commercial sponsorship, and from "live" programming such as broadcasts of sports contests. Programs sold on a syndicated basis may have been especially created for that purpose or they may consist of feature films or series programs previously broadcast on a network basis.

[3] Both the FCC's rules and the Copyright Act of 1976 employ the concepts of "local" and "distant" signals. In general, the signal of any given broadcast station is "local" where viewers can, and do, obtain sight and sound of reasonable quality on their home receivers without the amplification or modification provided by a cable system, and it is "distant" where this is not the case.

Television broadcast stations send out signals in a generally omnidirectional pattern. Beyond a certain distance (typically 60 miles) it becomes difficult or impossible to receive any given station's signal, unless it is retransmitted on another frequency. This limitation results in part from FCC requirements designed to avoid mutually destructive interference between stations and to ensure an optimum number of stations.

The Court of Appeals indicated (App. C at 10c), erroneously, that local stations consist only of those within 35 miles of the community of a cable system. In fact, stations considerably farther away frequently meet one or more of the criteria for treatment as local stations.

Without such FCC rules, cable television systems (unlike *any* other competing program exhibitor) may exploit for their own profit unlimited quantities of programs originated by television broadcast stations without bargaining for the right to use such programs, and even though local broadcast stations have purchased exhibition rights in the expectation that they could operate as the exclusive outlet for the particular programs for limited periods of time.

2. *The Unique Relationship Between Cable Television Systems and Television Broadcast Stations.*

Stations produce some of the programs broadcast ("local" programming), obtain others from networks if they have a network affiliation, and buy exhibition rights to still other programs from various distributors or syndicators.[4] Like other program exhibitors such as pay cable entrepreneurs and theatres, broadcast stations seek to maximize their audiences by, *inter alia,* investing in expensive, popular programs and by extensive efforts to promote the popularity of their programs. To ensure that the benefit of such efforts does not redound to competitors, broadcast stations (again like other exhibitors) acquire exclusive exhibition rights for programs within their respective service areas for limited periods of time.

Such exclusivity is made possible both by copyright law and by Section 325(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 325(a) (1976), which prohibits one station from rebroadcasting the signal of an-

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[4] A network affiliate typically obtains some 60% of its programming from its network; much of the balance consists of syndicated programming. Independent stations (those which do not have a network affiliation) have an even greater dependence on syndicated programming.

other without the latter's consent. When buying syndicated programming, for example, stations contract for exclusive exhibition rights within their respective service areas or markets. Stations in other markets cannot simply rebroadcast the signal (and programs) of the first buyer without a copyright license from the program seller or without rebroadcast consent from the first station pursuant to Section 325(a), and authority to give such consent can be the subject of negotiation and contract between the program seller and the first station.

In contrast, cable television systems operate completely outside the competitive marketplace created by Section 325 and the Copyright Act insofar as they are engaged in the retransmission of broadcast signals. Thus a Washington area cable system can and will impair or destroy the exclusivity which, for example, a Washington, D.C. station buys, by importing the signals of stations originating in New York, Chicago and Atlanta that have purchased the same programs as the Washington station has purchased.[5]

3. *Prior Regulatory Aspects of Broadcast/Cable Relationship*

In the mid-1960s the FCC began to regulate cable use of broadcast signals. Three principal considerations led the FCC to do so. *First,* since cable is available only to those who can afford to pay for it, any diminution that cable might cause in the quantity or quality of broadcast

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[5] Cable systems not only retransmit the signals of local and distant broadcast stations but also distribute programming originated specifically and exclusively for cable viewers. This programming, which often is available only for an additional fee and is referred to as "pay cable," must, under the copyright laws, be purchased in the competitive marketplace and the propriety of such competition is not at issue here.

service would reduce the television service that otherwise would be available to the economically disadvantaged or to those persons living in areas which are not served by cable television. *Second,* unlike other competing video technologies (including pay cable), cable retransmission of broadcast signals has historically occurred outside the normal marketplace for the acquisition of program exhibition rights. Without either normal copyright liability or FCC regulations imposing obligations comparable to Section 325(a), cable systems can retransmit (without consent from the program supplier or broadcast station) programs from one market to another, thereby frustrating the normal program distribution pattern and impairing local exclusive exhibition rights.[6] *Third,* by distributing broadcast signals from a few large cities to smaller communities throughout the country, cable undercuts the FCC policy of maximizing service from local broadcast outlets.[7]

After extensive rulemaking proceedings, the FCC concluded that it had and should exercise authority under

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[6] As the FCC has put it:

> This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product — the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all. *First Report and Order in Docket Nos. 14895 and 15233,* 38 F.C.C. 683, 704 (1965).

As the court below conceded, "while the broadcasting industry [has] spent billions of dollars to create and purchase programming, cable operators [have been] able to retransmit those programs at their operating cost without making any payment to program suppliers." App. C at 12c.

[7] The FCC is charged with ensuring "the fair, efficient, and equitable" allocation of broadcast service among the various states and communities. 47 U.S.C. § 307(b) (1976).

the Communications Act to regulate cable use of broadcast signals. *Second Report and Order in Docket Nos. 14895 and 15233,* 2 F.C.C.2d 725 (1966). This Court, in upholding the FCC's assertion of jurisdiction, ruled that the FCC was vested with the power to regulate any service "reasonably ancillary" to the Commission's primary statutory responsibilities. *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 177 (1968).

Among other things, the rules precipitating the *Southwestern Cable* decision prohibited any distant signal importation into the 100 largest television markets except upon a showing in an evidentiary hearing of consistency with the public interest. *Second Report and Order, supra,* 2 F.C.C.2d at 782. In late 1968, finding this *ad hoc* approach too cumbersome, the FCC proposed adoption of a retransmission consent requirement for CATV use of distant signals similar to the rebroadcast consent requirement of Section 325(a); thereafter, the FCC expanded the rulemaking proceeding with alternative proposals to allow CATV importation of specified numbers and types of distant signals.[8] The rule making resulted in comprehensive new rules adopted in 1972. *Cable Television Report and Order,* 36 F.C.C.2d 143, *reconsid. granted in part, Memorandum Opinion and Order,* 36 F.C.C.2d 326 (1972) ("*CTRO*" and "*CTRO Reconsidered,*" respectively). These rules were designed to permit enough distant signal importation to stimulate the growth and development of cable in larger markets but not so much as might impair the quality and quantity of local, free broad-

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[8] *Notice of Proposed Rule Making* and *Notice of Inquiry in Docket No. 18397,* 15 F.C.C.2d 417 (1968); *Second Further Notice of Proposed Rule Making in Docket No. 18397-A,* 24 F.C.C.2d 580 (1970).

cast service. As the FCC put it, the distant signal carriage rules represented its determination as to

> (a) the amount of distant signal competition that can be introduced into particular types of markets without having adverse local television service, and (b) the effect of distant signal carriage on the supply of television programming.

CTRO, supra, 36 F.C.C.2d at 168.[9]

Concurrently, Congress was attempting to address the appropriate interface of CATV and broadcasting, principally by means of proposed copyright legislation. Although the question remained in doubt for a long period, this Court ultimately held that cable retransmission of both local and distant broadcast signals did not constitute a public "performance" within the meaning of the 1909 Copyright Act. *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974). As a result, in the absence of FCC regulatory measures, cable systems were free to retransmit local and distant signals without operating within the normal restraints of the competitive marketplace.

Prior to the FCC's 1972 decision, throughout the long period in which Congress considered a general revision

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[9] Within 35-mile zones around local stations, cable systems were authorized to carry from one to three distant independent stations (depending on the size of the market), subject to compliance with rules relating to syndicated programming. The syndicated exclusivity rules, in turn, were "designed both to protect local broadcasters and to insure the continued supply of television programming," and were described as "fundamental to the continued functioning of broadcast and cable television alike." *Id.* at 169. Generally they required CATV systems within the 35-mile zones to delete from distant signals those programs for which the local station had purchased exclusive exhibition rights.

of the 1909 Copyright Act, various bills contemplated a limited compulsory copyright license for cable television — one containing important statutory exceptions designed to ensure that exclusive exhibition rights sold to broadcasters would not be significantly impaired by cable importation of distant signals. *See, e.g.*, S. Rep. No. 1219, 91st Cong., 2d Sess. 8-9 (1970). However, the FCC's 1972 initiative of adopting program exclusivity measures was intended to relieve Congress of the need to address exclusivity issues in the copyright legislation, thus facilitating passage of the long delayed modernization of the 1909 Act.[10]

Thus, the copyright legislation that finally emerged, the Copyright Act of 1976, Pub. L. No. 94-553, 17 U.S.C. §101 *et seq.* (Supp. III 1979), (1) defined any cable retransmission of a broadcast signal as a performance of a copyrighted work (17 U.S.C. §106), (2) created a compulsory licensing mechanism, requiring modest, noncompensatory payments for distant signal programming carried by cable systems (17 U.S.C. §111), and (3) confined the scope of that compulsory license to local signals and to distant signals only to the extent that such distant signal carriage "is permissible under the rules, regulations, or authorization of the Federal Communications Commission." (17 U.S.C. §111(c)(1)).

4. *The FCC's Decision to Repeal the Rules.*

Shortly after passage of the new Copyright Act, the FCC initiated new inquiries to review the syndicated program exclusivity rules (*Notice of Inquiry in Docket No.*

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[10] *CTRO, supra*, Appendices C and E, 36 F.C.C.2d at 261 and 286. *See also, CTRO Reconsidered, supra*, 36 F.C.C.2d at 328. Such legislation finally passed in 1976, effective for the most part on January 1, 1978.

20988, 61 F.C.C.2d 746 (1976)), and the distant signal carriage rules (*Notice of Inquiry in Docket No. 21284*, 65 F.C.C.2d 9 (1977)). These inquiries were followed by the institution of an informal rulemaking proceeding in 1979. *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284*, 71 F.C.C.2d 1004 (1979). In July, 1980, by a four to three vote, the FCC adopted the *Report* repealing both the syndicated program exclusivity and distant signal carriage rules. As a result, the scope of the compulsory license available under the Copyright Act became unlimited. Further, exclusive exhibition rights to particular programs or series of programs for which broadcasters had bargained and paid hundreds of millions of dollars were rendered meaningless insofar as cable retransmissions are concerned.

The veritable mountain of paper generated by the agency to rationalize the majority's decision amounts to this: Repeal is not likely, in the near future, to have a devastating impact on the quality and quantity of free broadcast television service. Notwithstanding the submission of evidence compiled by numerous parties that the repeal would skew the marketplace, the FCC determined that no such devastating injury would occur.[11] The Commission concluded that the public interest would best be served by allowing maximum "competition" between cable and broadcasting.

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[11] The FCC conceded that "[c]ertainly, the evidence demonstrates that local broadcast stations will earn less revenues and profits if distant signals are authorized than they otherwise would have. . . ." (*Report* at ¶189), but predicted that audience fragmentation with resulting loss of revenue was likely to be "only" an average of approximately ten percent, and thus would not significantly adversely affect existing levels of service provided by broadcasters. *Id.* at ¶191. With respect to the syndicated exclusivity rules, the FCC majority stated that their elimination was not likely to have much greater impact than elimination of the distant signal rules.

Numerous parties before the FCC pointed out that, without any regulation, the result would be far from normal or rational marketplace competition. With an unlimited compulsory copyright license, cable would enjoy an enormous competitive advantage over broadcast stations. To avoid such a skewed marketplace, the National Telecommunications and Information Administration of the United States Department of Commerce (NTIA) proposed that cable systems be required to obtain consent from the originating broadcast station before retransmitting nonnetwork programming to their subscribers. Ultimately the FCC rejected this and similar proposals solely on the ground that the 1976 Copyright Act robbed the FCC of jurisdiction under the Communications Act to adopt any such requirement.[12]

The agency majority also concluded that the FCC had no obligation under either statute to regulate cable television for so-called "copyright" purposes.

The Court of Appeals affirmed.

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[12] In the court below FCC counsel contended that the agency also had independently rejected the retransmission consent proposals on policy grounds. The lower court, however, concluded that the FCC's construction of the Copyright Act was the decisive issue, and went on to uphold the agency's preemptive interpretation of the Copyright Act. *See* App. C at 19c-25c.

REASONS FOR GRANTING THE WRIT

I. The Lower Court's Holding That The Copyright Act Of 1976 Prohibits The FCC From Adopting Mechanisms Such As Retransmission Consent Pursuant To Its Authority Under The Communications Act Is Inconsistent With Prior Decisions Of This Court And Improperly Impairs The Ability Of The FCC To Fulfill Its Broad Responsibilities Under The Communications Act.

The claim sustained by the lower court that the Copyright Act of 1976 repealed by implication some of the FCC's powers under the Communications Act conflicts with repeated decisions of this Court rejecting the notion of repeals by implication. *See, e.g., Nader* v. *Allegheny Airlines,* 426 U.S. 290, 298 (1976); *FAA* v. *Robertson,* 422 U.S. 255, 266 (1975). Ordinarily, courts should not infer withdrawal of the jurisdiction of an agency, conferred by a prior legislative enactment, "absent a clearly expressed congressional intention." *FAA* v. *Robertson, supra,* at 266. Here, there is no such "clearly expressed congressional intention" in either the language of the Copyright Act or its legislative history.[13] Indeed, the relevant evidence of congressional intent points to just the opposite conclusion: the new Copyright Act leaves the FCC free to regulate the circumstances in which cable systems may retransmit distant broadcast signals so long as broadcast stations and their program suppliers are not deprived of

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[13] The fact that Congress rejected full copyright liability for cable systems for *all* broadcast signals, local and distant, does not suggest otherwise. Among other matters, given the fact that substantial numbers of cable systems already had been operating with complete immunity from copyright liability for many years, full copyright liability reasonably could have been viewed as too disruptive. Thus, at the time it was felt that until and unless mechanisms for obtaining copyright clearances were created, existing cable systems might have had to cease operations completely. In contrast, a retransmission requirement could apply only to programs and signals that cable systems had previously been barred from retransmitting.

the minimal rights established by the Copyright Act itself.

Section 111(c) of the Copyright Act, 17 U.S.C. §111(c)(1) (Supp. III 1979), provides in pertinent part:

> [a] secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission . . . and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) *where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.* (emphasis added)

On its face, the Act provides that only cable retransmissions "permissible under the rules, regulations, or authorizations of the Federal Communications Commission" receive a compulsory license. The FCC's authority to prohibit *any* secondary transmissions of distant stations, thereby imposing, in effect, full copyright liability for such transmissions, is preserved. Furthermore, with a single possible exception,[14] the Copyright Act does not preclude the Commission from adopting rules patterned on Section 325 of the Communications Act.[15] The compulsory licensing scheme comes into play only after the FCC permits retransmission, on such terms and subject to such conditions or limitations as deemed to be appropriate under the Communications Act. Accordingly, the Copyright Act is properly viewed

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[14] At least in the absence of a copyright license from the program owner, the FCC may not permit cable retransmission without payment of at least the nominal statutory royalty imposed by the Copyright Act. 17 U.S.C. §111(c).

[15] To the contrary, the Act places affirmative obligations on the FCC to implement the regulatory scheme intended by the delicate balance constructed by Congress.

as establishing a floor below which the FCC may not go in sanctioning cable retransmission but in no way as establishing a ceiling.

The lower court expressed incredulity at the notion that, "in an era of compulsory copyright licensing, . . . Congress intended its formula for [cable television] royalty fees to be only a minimum subject to FCC alteration, since it delegated broad discretionary authority to the [Copyright Royalty] Tribunal, and not the FCC, to readjust the rates if regulatory action so required." App. C at 24c. This so-called "era" involves three other, and relatively minor, compulsory licensing exceptions to the general statutory scheme. *See* App. C at 44c. But more fundamentally, the NTIA and other similar proposals did not call upon the FCC to assume the role of yet another governmental body setting rates or fees for private transactions. Rather than seeking any such further governmental interference with the normal competitive marketplace, they called upon the FCC to exercise its plenary authority under the Communications Act to create an environment in which both broadcasting and cable could compete on equal terms.

Other provisions of the 1976 Copyright Act also are in conflict with the Court of Appeals action here. Most importantly, Section 301, characterized by the legislative history as "one of the bedrock provisions of the bill" (S. Rep. No. 473, 94th Cong., 1st Sess. 112 (1974)), explicitly provides that "[n]othing in this title annuls or limits any rights or remedies under any other federal statute." 17 U.S.C. § 301(d) (Supp. III 1979). This savings clause stands in marked contrast to the savings clauses in many other statutes. Here, Congress specifically differentiated between the types of regulations that the statute is intended to preempt, § 301(a) (state and local regulation), and the type of regulations not preempted, § 301(d) (federal statutes).

Yet, the lower court, in holding that the FCC "is not free to adopt a new [regulatory approach] . . . that would be inconsistent with a basic arrangement of the new legislation," (App. C at 23c), totally ignored Section 301(d) and unfairly disparaged as mere "glimmerings" other legislative history demonstrating that the court was wrong.

This Court has explained that under the Communications Act the FCC is "expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable or radio.'" *United States* v. *Southwestern Cable Co., supra,* at 168. Thus, in the Communications Act, Congress "gave the Commission 'a comprehensive mandate,' with not 'niggardly but expansive powers.'" *Id.* at 173, *quoting National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943). Moreover, the FCC's jurisdiction is "not just as a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies," *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 664 (1972) (*"Midwest Video I"*) (plurality opinion). To hold otherwise is "inconsistent with" this Court's "recognition in *Southwestern* 'that it was precisely because Congress wished to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission . . . that it conferred upon the Commission a unified jurisdiction and broad authority.'" *Id.* at 665 (footnotes omitted).[16]

The decision below violates yet another accepted principle of statutory construction. This Court has made

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[16] Following *Midwest Video I*, an FCC prohibition of state and local regulation of rates charged for pay cable was upheld because "the FCC may regulate cable TV if its regulation will further a goal which

clear that repeals of a pre-existing right, such as the FCC's authority to impose retransmission consent, should not be implied "'unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.'" *Nader* v. *Allegheny Airlines, supra,* at 298, *citing Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, 437 (1970). Here, there is no such repugnancy. The FCC's adoption of rules to expand or contract the scope of the statutory compulsory license is not repugnant to the Copyright Act, so long as the statutory mechanism for adjusting royalty rates can adequately take account of the change. Here, the statutory royalty mechanism can be adequately adjusted to take account of the effects of the NTIA's retransmission consent proposal. Because these statutes are "'capable of coexistence, it'" was "'the duty of the'" court below, "'absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *FAA* v. *Robertson, supra,* at 266, *citing Regional Rail Reorganization Act Cases,* 419 U.S. 102, 133-34 (1974). *See Morton* v. *Mancari,* 417 U.S. 535, 551 (1974).

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it is entitled to pursue in the broadcast area." *Brookhaven Cable TV, Inc.* v. *Kelly,* 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied,* 441 U.S 904 (1979).

The FCC is not only entitled but required by Section 325 to ensure that stations do not use the programs of other stations without obtaining consent. It cannot shirk this duty on the theory that Section 325 is redundant of the requirements of the copyright law. Thus, the FCC may likewise require cable systems to obtain retransmission consent before using the signal of a broadcast station, as a matter of communications policy, consistent with both the Communications Act and the Copyright Act. *See also FCC* v. *Midwest Video Corp.,* 440 U.S. 689, 699-700 (1979).

The Copyright Act does not repeal by implication or otherwise the FCC's authority to regulate cable for purposes comparable to those reflected in Section 325 of the Communications Act.

II. The FCC's Repeal Is Contrary To The Copyright Act And The Communications Act.

A. The lower court's decision contravenes the congressional intent underlying the copyright law.

The rescission of the syndicated program exclusivity and distant signal rules destroys the delicate balance contemplated by Congress between allowing copyright owners the maximum opportunity to market their programs in accordance with their own perception of their best interests, and the desire to avoid disrupting a then fairly small cable television industry which had theretofore escaped the responsibility of bargaining for program exhibition rights. Those conflicting goals resulted in the adoption of a statutory compulsory license limited to the programs made available to cable under a comprehensive FCC regulatory scheme designed in large part to further the interests of copyright owners as well as the broader public interest. By simply repealing its rules, and by abdicating any responsibility for the creation and maintenance of a rational marketplace, the FCC destroyed the predicate for the compulsory license. The critical point is that Congress acted against the backdrop of the then-existing FCC rules, and in light of FCC representations that fundamental changes in the rules and its regulatory policies regarding cable television were *not* contemplated.[17]

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[17] *See, e.g.*, 119 Cong. Rec. 9389 (1973) (remarks of Senator McClellan explaining that statutory limitations on the scope of the compulsory license were no longer necessary in view of the FCC's

By ignoring this point, and by reading other legislative history through the proverbial looking-glass, the lower court disparaged the 1972 distant signal rules as mere "proxies" and "surrogates" for statutory copyright which were rendered superfluous by the 1976 legislation. App. C at 13c, 14c.

But in adopting the 1976 Copyright Act, Congress made clear that it was not inviting FCC abdication of regulatory responsibility:

> We . . . caution the Federal Communications Commission . . . not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 89 (1976).[18]

1972 rules); S. Rep. No. 93-983, 93rd Cong., 2d Sess. 132 (1974) (statutory restrictions on compulsory licensing for cable retransmission of sports broadcasts unnecessary in view of FCC representations that it would deal with the problem through its regulatory powers under the Communications Act); H. Rep. No. 94-1476, 94th Cong., 2d Sess. 176 (1976) (open-ended compulsory license is acceptable because FCC's syndicated exclusivity rules protect the interests of program suppliers).

[18] Besides disparaging these words as mere "glimmerings of legislative history," the lower court speculates that they possibly reflect only "concern for congressional etiquette among the several committees with overlapping jurisdiction over the regulated subject matter. . . ." App. C. at 20c, 22c. None of this is consistent with this Court's standards for statutory construction.

To be sure, Congress did not "freeze" the scope of the compulsory license to encompass no more (or less) than was permissible under the FCC rules at any given moment.[19] The possibility of *some* increase in the number of distant signals available under the FCC's syndicated exclusivity and sports rules that might increase *or* decrease the broadcast programs available to cable under FCC rules. The Copyright Royalty Tribunal ("CRT") was authorized to make some adjustments in royalty rates in the event of such occurrences. 17 U.S.C. § 801(b)(2)(B) and (C) (Supp. III 1979). But this envisioning of some fine tuning of FCC regulations is not the same as expecting or condoning total abdication of FCC regulatory responsibility. And Congress clearly did not contemplate the FCC abdication reflected in the agency's *Report* in this case. As Robert E. Lee, senior member of the FCC, put it in his dissent to the *Report:*

> The CATV system takes the programming without participation in the marketplace and without any regard for the contractual rights of those who have participated. It uses this programming for its own profit.

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[19] The amount of the statutory royalty fee varies with the number of distant signals (or, more accurately, the number of "distant signal equivalents") carried by a cable system, but any number of local stations may be carried without affecting the amount of the fee. *See* 17 U.S.C. §111(d) (2) (B). If Congress had contemplated or intended to sanction drastic revisions in the FCC's rules, it presumably would not have been concerned with a new FCC rule that declared all stations to be "local" throughout the entire country, and thus available subject only to the payment of the minimum fee. But in fact for copyright purposes the Congress chose to freeze the FCC definition of a local signal as of April 15, 1976. *See* 17 U.S.C. §111(f). This and other aspects of the statute belie any intent to condone what the FCC opted to do in its 1980 *Report.*

> I recognize that copyright legislation is supposed to be the solution for this problem. With syndicated exclusivity protection in our rules, it may be. As one who lived through the "Consensus Agreement," the development of our 1972 rules, and the Copyright Act, *I can assure my colleagues that maintaining syndicated exclusivity was the understanding of all of the participants. It was one of the premises of the copyright legislation.*

Report, at p. 892 (emphasis added).[20]

Moreover, at the very time that the FCC was considering repeal of the rules at issue here, Representative Kastenmeier, for many years Chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, and the congressman who led the initiative to modernize the Copyright Act of 1909, warned that Congress envisioned no such change in 1976:

> The announced intention of the Commission to deregulate the cable industry is particularly of interest because we did not contemplate such a sweeping change in the regulatory structure when we drafted [the 1976 Copyright Act].

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[20] Still more recently the former Register of Copyrights echoed this sentiment:

> "In 1976 it was generally, if not universally, assumed that the FCC might tinker with its rules, and that if it did so the Copyright Royalty Tribunal could restore the proper balance by adjustments in the statutory royalty rates. It was not anticipated that the FCC would completely abandon the protection it offered copyright owners, and I believe that this change is too great to be appropriately and effectively redressed in CRT proceedings." Statement of Barbara Ringer, Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice Committee on the Judiciary, U.S. House of Representatives, at 6 (June 25, 1981).

> There is little doubt that the 1976 Copyright Act was written against the backdrop of existing communications law and regulations. *There is also little doubt that it is impossible to completely separate copyright law and communication policy as the Copyright Act of 1976 is now written.* Letter from Representative Kastenmeier to the Honorable Charles Ferris, Chairman, FCC (March 13, 1980) (emphasis added).

In short, instead of being mere "glimmerings" of congressional intent, as characterized by the lower court, the legislative history of the 1976 Copyright Act clearly does not render the FCC's 1972 rules obsolete "surrogates" or "proxies" for the new statute. Rather, the legislative history stands for the proposition that continuation of those rules, or creation of an appropriate substitute aimed at effectuating the same basic policies, was essential to achievement of the statutory scheme. For that reason alone, this Court should grant this petition.

B. The lower court's decision adopts a narrow view of the FCC's responsibilities under the Communications Act which is inconsistent with prior decisions of this court.

Section 1 of the Communications Act of 1934, as amended, states that the FCC's purpose is "to make available, so far as possible, *to all the people of the United States,* a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. §151 (1976) (emphasis added).[21] The FCC's statutory duty is to ensure that the best practicable broadcast service will be provided to *all* the public "and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g) (1976)

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[21] In its cursory review of the "FCC's statutory directives," App. C at 30c, the lower court simply ignored the words emphasized in the text above.

This Court has held that these statutory provisions manifest a congressional intent to encourage and facilitate the development of a universally available, free, locally-oriented, over-the-air broadcasting system. Thus, in *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), this Court explained that "the avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *Id.* at 217. Subsequently, in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court underscored the Commission's "broad responsibilities for the orderly development of an appropriate system of *local television broadcasting*," *id.* at 177 (emphasis added), and ruled that the Commission had jurisdiction over cable, to the extent "reasonably ancillary" to the effectuation of the Commission's primary statutory responsibility of ensuring the development of, and service by, the free broadcasting system.

Simple repeal of the distant signal and syndicated exclusivity rules, without substitution of some mechanism that would permit a normal marketplace to function, prevents broadcast stations from providing the public with the best possible service. Inevitably some program suppliers, faced with a choice of selling their wares to pay cable entrepreneurs, where exclusivity can be sold, or to conventional broadcast stations, where exclusive exhibition rights *vis-à-vis* cable retransmissions are precluded, will opt for the non-broadcast service for those reasons alone. Major sports interests have already explained that simple repeal of the cable television rules renders the broadcast medium far less attractive than it otherwise would be for the exhibition of sports contests. *Report* at ¶ 265

It was only by viewing its responsibility under the Communications Act as merely one of prevention of

devastating impact, and by attempting to blame Congress and the Copyright Act of 1976 for the anomaly created by simple repeal, that the FCC majority and the lower court were able to justify the agency's decision.

III. The Lower Court's Rationalization For The Agency's Failure To Phase Out The Existing Rules In An Orderly Manner Is Inconsistent With The Prior Decisions Of This Court.

The lower court rationalized the agency's termination of existing exclusivity rights, for which millions of dollars have been expended, on the basis of a Fifth Circuit case holding that the FCC need not create "grandfather rights" in perpetuity. *See* App. C at 31c-32c. But that was not the issue. Existing program contracts will expire by their own terms over a period of years. Many if not all of the pre-1979 contracts were negotiated and executed in the expectation that broadcast stations would be entitled to exclusivity *vis-à-vis* cable retransmissions of the same programs.[22]

This Court and others have repeatedly held that administrative agencies may and should take existing equities into account in modifying their rules. *E.g., FTC* v. *Royal Milling Co.*, 288 U.S. 212 (1933); *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied* 430 U.S. 983 (1977); *City of Chicago* v. *FPC*, 385 F.2d 629, 637 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); *National Association of Independent Television Producers and Distributors* v. *FCC*, 502 F.2d 249, 253-54 (2d Cir. 1974) (requiring the FCC to delay implementation

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[22] The Commission had suggested that existing exhibition rights would be "grandfathered." *1979 Notice, supra*, at 1027. That notion, however, was later rejected in the *Report*, at ¶¶ 237-240.

of changes in existing rules on the basis of which independent program producers had made substantial investments). The appropriateness of tailoring changes in policy to minimize disruption of prior expectations is no longer open to serious question. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). The lower court simply ignored these considerations.

CONCLUSION

In *United States* v. *Southwestern Cable Co.*, *supra*, this Court observed that:

> The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems.

392 U.S. at 177.

In the intervening 13 years the significance of the television medium to the public has greatly increased. By the narrowest of possible votes, the FCC has adopted a fundamental change in agency policy that may well lead to significant changes in the structure and composition of television service to the public. That fundamental change in agency policy was upheld by the lower court on the basis of an unprecedented and clearly erroneous interpretation of the Copyright Act of 1976 and its interrelationship with the Communications Act of 1934. Plenary review of these important federal statutory issues by this Court is fully warranted.

Respectfully submitted,

ERWIN G. KRASNOW
RAUL R. RODRIGUEZ
National Association of Broadcasters
1771 N St., N.W.
Washington, D.C. 20036
(202) 293-3560

Attorneys for Petitioner
National Association of
Broadcasters

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APPENDIX A

Relevant Statutes

Excerpts from the Copyright Revision Law of 1976

Sec. 111(c) [17 U.S.C. 111(c)] Secondary Transmissions by Cable Systems.--

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a

work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work iw actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections

502 through 506 and 509, in the following cases:

> (A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or
>
> (B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (c) of

this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertise-

ments performed by those engaged in television commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmissions: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial line.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by an appropriate governmental authority of

Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules,

regulations, or authorizations of the Federal Communications Commission.

Sec. 111(d) [17 U.S.C. § 111(d)] Compulsory License for Secondary Transmissions by Cable Systems. --

(1) For any secondary transmission to be subject to sompulsory licensing under subsection (c), the cable system shall, at least one month before the date of the commencement of operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control or the signal carriage complement of the cable system changes, record in the Copyright Office a notice including a statement of the identity and address of the person who

owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted) shall prescribe by regulation to carry out the purpose of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright

Royalty Tribunal (if and when the Tribunal has been consituted), prescribe by regulation --

> (A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may, after consultation with the

Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programing of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against

the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and in computing the amounts payable under paragraph (ii) through (iv),above, any fraction of a distant signal equivalent shall be computed at its

fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for basic service or providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by

subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable

under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to $80,000; and (ii) 1 per centum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

(3) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as

provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose word was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local

service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and

(C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existance of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsec-

tion, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

Sec. 301 [17 U.S.C. § 301]. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created

before ar after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

* * *

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

Sec. 801 (b) [17 U.S.C. § 801(b)] Subject to the provisions of this chapter, the purposes of the [Copyright Royalty] Tribunal shall be --

* * *

(2) to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

(A) The rates established by section 111(d) (2)(B) may be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act: *Provided*, That if the average rates charged cable subscribers for the basic service of providing secondary transmissions are changed so that the

average rates exceed national monetary inflation, no change in the rates established by section 111(d)(2)(B) shall be permitted; *And provided further,* That no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The Commission [sic] may consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(2)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission

rules and regulations, the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users: *Provided*, That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976,

pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television

broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111 (d)(2)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment; and

(3) to distribute royalty fees deposited with the Register of Copyrights under sections 111 and 116, and to deter-

mine, in cases where controversy exists, the distribution of such fees.

Excerpts from the Communications Act of 1934, as Amended

Sec. 1. [47 U.S.C. § 151] For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted

by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commissio " which shall be constituted as hereina.ter provided, and which shall execute and enforce the provisions of this Act.

Sec. 303. [47 U.S.C. § 303] Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger

and more effective use of radio in the public interest;

* * *

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

Sec. 307. [47 U.S.C. 307]

* * *

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Sec. 325. [47 U.S.C. § 325]

(a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signals of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting sta-

tion without the express authority of the originating station.

Sec. 330. [47 U.S.C. § 330] (a) No person shall ship in interstate commerce, or import from any foreign country into the United States, for sale or resale to the public, apparatus described in paragraph (s) of section 303 unless it complies with rules prescribed by the Commission pursuant to the authority granted by that paragraph: Provided, That this section shall not apply to carriers transporting such apparatus without trading in it.

(b) For the purposes of this section and section 303(s) --

(1) The term "interstate commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of

Puerto Rico, or any possession of the United States and any place outside thereof which is within the United States, (B) commerce between points in the same State, the District of Columbia, the Commonwealth of Puerto Rico, or possession of the United States but through any place outside thereof, or (C) commerce wholly within the District of Columbia or any possession of the United States.

(2) The term "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the posessions of the United States, but does not include the Canal Zone.

APPENDIX B

Relevant Regulations of the Federal Communications Commission

§ 76.57 Provisions for systems operating in communities located outside of all major and smaller television markets.

A community unit operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5 shall carry television broadcast signals in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part:

(2) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station:

(3) Noncommercial educational television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part:

(4) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signals.

(c) In addition to the television broadcast signals carried pursuant to paragraphs (a) and (b) of this Section any television broadcast station during the period from sign-off of the last television broadcast station which the community unit must carry pursuant to § 76.57 (a), or from 12:00 a.m. in the Central and Mountain Time Zones and 1:00 a.m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the community unit must carry pursuant to § 76.57(a): *Provided however,* That a community unit may carry a program to its completion: *And provided further,* That this paragraph does not authorize carriage in

the manner described above whenever a television broadcast station that the community unit must carry pursuant to § 76.57(a) broadcasts continuously and does not sign-off during the hours from 12:00 a.m. to 6:00 a.m. Carriage of such additional television signals shall not require prior registration with the Commission and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(d) In addition to the television broadcast signals carried pursuant to paragraphs (a), (b) and (c) of this section, any television station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior registration with the Commission.

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13866, July 14, 1972: 40 FR 39511, Aug. 28, 1975: 41 FR 30337, July 23, 1976: 42 FR 19346, Apr. 13, 1977: 43 FR 49008, Oct. 20, 1979]

§ 76.59 Provisions for smaller television markets.

A community unit operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part:

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part:

(3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the community unit is located, in whole or in part:

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt. - Plattsburgh, N.Y., television market):

(5) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or

expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educatinal translator station:

(6) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit constituting all or part of a system having fewer than 1,000 subscribers may carry any additional television signals. Any such community unit constituting all or part of a system having 1,000 or more subscribers may carry sufficient additional signals so that, including the sig-

nals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of one independent television station: *Provided, however,* That, in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be required to be carried pursuant to paragraph (a)(1) of this section, shall be considered to be operational for a period terminating 18 months after grant of its initial construction permit.

(c) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry the signals of any noncommercial educational stations that are operated by

an agency of the State within which the community unit is located. Such community unit may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any local noncommercial educational station or State or local educational television authority.

(d) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (c) of this section, any such community unit may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior registration with the Commission.

(2) Any television station broadcasting a network program that will not be

carried by a station normally carried on the community unit. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior registration with the Commission.

(3) Any television broadcast station during the period from sign-off of the last television broadcast station which the community unit must carry pursuant to § 76.59(a), or from 12:00 a.m. in the Central and Mountain Time Zones and 1:00 a.m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the community unit must carry pursuant to § 76.59(a): *Provided, however,* That a community unit may carry a program to its completion: *And provided further,* That this subsection does not authorize carriage in the manner described above whenever a television broadcast

station that the community unit must carrry pursuant to § 76.59(a) broadcasts continuously and does not sign-off during the hours from 12:00 a.m. to 6:00 a.m. Carriage of such additional television signals shall not require prior registration with the Commission and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the community unit is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior registration with the Commission.

(5) Any commercial UHF television station within whose Grade B contours the community of the system is located, in whole or in part.

(e) Where the community of a community unit is wholly or partially within both one of the first 50 major television markets and a smaller television market, the carriage provisions for the first 50 major markets shall apply. Where the community of a community unit is wholly or partially within both one of the second 50 major television markets and a smaller television market, the carriage provisions for the second 50 major markets shall apply.

(Secs. 2, 3, 4, 5, 301, 303, 307, 308, 309, 315, 317, 48 Stat. as amended, 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089; (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317))

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13867, July 14, 1972: 40 FR 39511. Aug. 28, 1973: 41 FR 1066, Jan. 6, 1976: 41 FR 10902, Mar. 15, 1976; 41 FR 30337, July 23, 1976: 42 FR 19346, Apr. 13 1977, 42 FR 36834, July 18, 1977; 43 FR 20235, May 11, 1973; 43 FR 49009, Oct. 20, 1973]

§ 76.61 Provisions for first 50 major television markets.

A community unit operating in a community located in whole or in part within one of the first 50 major television markets listed in § 76.51(a) shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community

of the community unit is located, in whole or in part: *Provided, however,* That where a community unit is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the community unit is located is wholly within the specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section:

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part:

(3) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to

community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station:

(4) Television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market):

(5) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such part of a system having fewer than 1,000 subscrib-

ers may carry any additional television signals. Any such community unit constituting all or part of a system having 1,000 or more subscribers may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of three independent television stations: *Provided, however,* That in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be required to be carried pursuant to paragraph (a) (1) of this section, shall be considered to be operational, for a period terminating 18 months after grant of its initial construction permit.

(1) Whenever, pursuant to this

section a community unit is permitted to carry three additional independent signals, one of these signals must be that of a UHF television broadcast station.

(2) Whenever, pursuant to Subpart F of this part, a community unit is required to delete a television program on an independent signal carried pursuant to this section or a program on such a signal is primarily of local interest to the distant community (e.g., a local news or public affairs program), such community unit may, consistent with the program exclusivity rules of Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the community unit need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

(c) After the service standards specified in paragraph (b) of this section have been satisfied, a community unit may carry two additional independent television broadcast signals: *Provided, however,* That the number of additional signals permitted under this paragraph shall be reduced by the number of signals added to the community unit pursuant to paragraph (b) of this section.

(d) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry the signals of any noncommercial educational stations that are operated by an agency of the State within which the community unit is located. Such community unit may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any

local noncommercial educational station or State or local educational television authority.

(e) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such community unit may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior registration with the Commission.

(2) Any television station broadcasting a network program that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise avail-

able, and shall not require prior registration with the Commission.

(3) Any television broadcast station during the period from sign-off of the last television broadcast station which the community unit must carry pursuant to § 76.61(a), or from 12:00 a.m. in the Central and Mountain Time Zones and 1:00 a.m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the community unit must carry pursuant to § 76.61(a): *Provided, however,* That a community unit may carry a program to its completion: *And provided further,* That this subsection does not authorize carriage in the manner described above whenever a television broadcast station that the community unit must carry pursuant to § 76.61(a) broadcasts continuously and does not sign-off during the hours from 12:00 a.m. to 6:00 a.m.

Carriage of such additional television signals shall not require prior registration with the Commission and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the community unit is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior registration with the Commission.

(5) Any commercial UHF television station within whose Grade B contours the community of the system is located, in whole or in part.

(f) Where the community of a community unit is wholly or partially within both one of the first 50 major television markets and another television market, the provisions of this sections shall apply.

(Secs. 2,3,4,5, 301, 303, 307, 308, 309, 315, 317, 48 Stat. as amended, 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089: (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317)

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13867, July 14, 1972: 40 FR 39511, Aug. 28, 1975; 41 FR 1066, Jan. 6, 1976: 41 FR 3868; Jan. 27, 1975; 41 FR 10902, Mar. 15, 1976; 41 FR 30337, July 23, 1976; 42 FR 19346, Apr. 13, 1977; 42 FR 36835, July 18, 1977, 43 FR 20235, May 11, 1978; 43 FR 49009, Oct. 20, 1978]

§ 76.63 Provisions for second 50 major television markets.

(a) A community unit operating in a community located in whole or in part within one of the second 50 major television markets listed in § 76.51(b) shall carry television broadcast signals only in accordance with the provisions of § 76.61, except that in paragraph (b) of § 76.61, the number of additional independent television signals that may be carried is two (2).

(b) Where the community of a community unit is wholly or partially within both one of the second 50 major television markets and one of the first 50 major television markets, the carriage provisions for the first 50 major markets shall apply. Where the community of a community unit is wholly or partially within both one of the second 50 major television markets and a smaller television market, the provisions of this section shall apply.

§ 76.65 Grandfathering provisions.

(a) The provisions of §§ 76.57, 76.59, 76.61, and 76.63 shall not require the deletion of any television broadcast or translator signals which a community unit was authorized to carry or was lawfully carrying prior to March 31, 1972: *Provided, however,* That if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart. If a community unit is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other community unit already operating or subsequently commencing operations in the same community may carry the same signals. (Any such new community unit shall, before instituting service, register with the Commission of otherwise required by § 76.12.)

(b) The provisions of §§ 76.57, 76.59, 76.61 and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a system community unit having fewer than 50 subscribers but constituting all or part of a system having 1,000 or more subscribers was carrying prior to May 16, 1977, until the community unit has 50 subscribers.

(c) When, for purposes of ascertaining cable signal carriage rights or broadcast station rights to cable system carriage, reference is made to Grade B contours in §§ 76.57, 76.59, 76.61, or 76.63, such contours shall be the field intensity contours defined in § 73.683(a) of this chapter. *Provided, however,* That such rights as to signals carried or authorized for carriage on or before August 26, 1977, shall be determined by reference to the contour prediction rules adopted in

the Sixth Report and Order in Dockets 8736, 8975, 8976 and 9175, 41 FCC 148 (1952) as amended by Report and Order in Docket 17253 FCC 70-345, 22 FCC 2d 354 (1970).

(Secs. 2, 3, 4, 5, 301, 303, 307, 308, 309, 315, 317, 48 Stat., as amended 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089: (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317))

[37 FR 3278. Feb. 12, 1972, as amended at 42 FR 19346; Apr. 13, 1977; 42 FR 23510, May 9, 1977; 42 FR 36835, July 18, 1977; 43 FR 20235, May 11, 1978; 43 FR 48009, Oct. 20, 1978]

§76.151 Syndicated program exclusivity; extent of protection.

Upon receiving notification pursuant to §76.155: (a) No community unit operating in a community in whole or in part within one of the first 50 major television markets, shall carry a syndicated program,

pursuant to §76.61(b),(c),(d), or (e)(1)-(e)(4), for a period of 1 year from the date that program is first licensed or sold as a syndicated program to a television station in the United States for television broadcast exhibition:

(b) No community unit, operating in a community in whole or in part within a major television market, shall carry a syndicated program, pursuant to §§ 76.61(b), (c),(d) or (e)(1)-(e)(4), or 76.63(a) (as it refers to §76.61(b),(c),(d), or (e)(1)-(e)(4)), while a commercial television station licensed to a designated community in that market has exclusive broadcast exhibition rights (both over-the-air and by cable) to that program: *Provided, however,* That if a commercial station licensed to a designated community in one of the second 50 major television markets has such exclusive rights, a community unit located in

whole or in part within the market of such station may carry such syndicated programs in the following circumstances:

(1) If the program is carried by the community unit in prime time and will not also be broadcast by a commercial market station in prime time during the period for which there is exclusivity for the program:

(2) For off-network series programs:

(i) Prior to the first nonnetwork broadcast in the market of an episode in the series;

(ii) After a nonnetwork first-run of the series in the market or after 1 year from the date of the first nonnetwork broadcast in the market of an episode in the series, whichever occurs first;

(3) For first-run series programs:

(i) Prior to the first broadcast in the market of an episode in the series;

(ii) After two (2) years from the first broadcast in the market of an episode in the series;

(4) For first-run, nonseries programs:

(i) Prior to the date the program is available for broadcast in the market under the provision of any contract or license of a television broadcast station in the market;

(ii) After two (2) years from the date of such first availability;

(5) For feature films:

(i) Prior to the date such film is available for nonnetwork broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(ii) Two (2) years after the date of such first availability;

(6) For other programs; 1 day

after the first nonnetwork broadcast in the market or 1 year from the date of purchase of the program for nonnetwork broadcast in the market, whichever occurs first.

NOTE 1: For purposes of §76.151, a series will be treated as a unit, that is:

(i) No episode of a series (including an episode in a different package of programs in the same series) may be carried by a cable community unit, pursuant to §§76.61(b), (c),(d), or (e)(1)-(e)(4) or 76.63(a)(as it refers to §76.61 (b),(c), (d), or (e)(1)-(e)(4)) while any episodes of the series are subject to exclusivity protection.

(ii) In the second 50 major television markets, no exclusivity will be afforded a different package or programs in the same series after the initial exclusivity period has terminated.

NOTE 2: As used in this section,

the phrase "broadcast in the market" or "broadcast by a market station" refers to a broadcast by a television station licensed to a designated community in the market.

[37 FR 3278, Feb. 12, 1972, as amended at 42 FR 19347, Apr. 13, 1977; 42 FR 36835, July 18, 1977; 42 FR 41127, Aug. 15, 1977; 43 FR 36949, Aug. 21, 1978]

§ 76.153 Parties entitled to exclusivity.

(a) Copyright holders of syndicated programs shall be entitled to the exclusivity provided by § 76.151(a). In order to receive such exclusivity, the copyright holder shall notify each cable television system operator of the exclusivity sought in accordance with the requirements of §76.155.

(b) Television broadcast stations licensed to designated communities in the major television markets shall be entitled to the exclusivity provided by §76.151(b).

In order to receive such exclusivity, such television stations shall notify each cable television system operator of the exclusivity sought in accordance with the requirements of §76.155.

(c) In order to be entitled to exclusivity for a program under §76.151(b), a television station must have an exclusive right to broadcast that program against all other television stations licensed to the same designated community and against broadcast signal cable carriage of that program in the cable community: *Provided, however,* That such exclusivity will not be recognized in a designated community of another major television market unless such community is wholly within the television market of the station seeking exclusivity. In hyphenated markets, exclusivity will be recognized beyond the specified zone of a station only to the extent the station has

exclusivity against other stations in the designated communities of the market. In such instances, exclusivity to the extent a station has obtained it will be recognized within the specified zones of such other stations. It shall be presumed that broadcast rights acquired prior to March 31, 1972, are exclusive for the specified zones of all stations in the market in which the station is located. [37 FR 3278, Feb. 12, 1972, as amended at 42 FR 19347, Apr. 13, 1977]

§ 76.155 Notification.

(a) Syndicated program exclusivity notifications shall include the following information:

(1) For purposes of §76.151(a):

(i) The name and address of the copyright holder requesting exclusivity;

(ii) The name of the program or series for which exclusivity is sought;

(iii) The date of first sale or license of the program for television broadcast as a syndicated program in the United States.

(2) For purposes of § 76.151(b):

(i) The name and address of the television broadcast station requesting for which exclusivity is sought.
Exclusivity;

(ii) The name of the program or series

(iii) The dates on which exclusivity is to commence and terminate;

(iv) As to programs to be deleted from signals regularly carried by the system pursuant to §§ 76.61(b),(c),(d),(e)(1), or (e)(2) and 76.63(a) (as it refers to §76.61(b),(c),(d),(e)(1), or (e)(2): the name of the programs; the call letters of the station from which the deletion is to be made; and the date, time, and duration

of the deletion. Information, once supplied pursuant to paragraphs (a)(2)(i), (ii), (iii), or (a)(3) of this section, need not be repeated in any notification supplying the information required by the subparagraph.

(3) For purposes of §76.151(b) (as it relates to television stations licensed to designated communities in the second 50 major television markets), the following information shall be supplied in addition to that required by paragraph (a)(2) of this paragraph:

(i) Whether the program will be broadcast in prime time by the station requesting exclusivity during the period of protection provided in §76.151(b);

(ii) The specific rule pursuant to which exclusivity is requested (e.g., §76.151(b)(2) -- off-network series, §76.151(b)(3) -- first-run series);

(iii) For off-network series programs, the number of showings contracted for, including the number of repeat presentations, if any, and the date when the first run is to end.

(b) Subject to the provisions of paragraph (c) of this section, notifications given pursuant to §76.151 must be received no later than the Monday preceding the calendar week (Sunday-Saturday) during which exclusivity is sought.

(c) Direct notice of a change in the schedule of a television station against which exclusivity is sought, given to a cable television system operator by a television station seeking exclusivity, shall, if given more than 36 hours prior to the time a deletion is to be made, supersede prior notifications containing the information required by paragraph (a) of this section and any information otherwise

relied on pursuant to paragraph (d) of this section.

(d) In determining which programs must be delegated from a television signal when such information is not required to be provided pursuant to paragraph (a) of this section, a cable television system operator may rely on information from any of the following sources published or made available during the week the deletion is to be made or during the prior week:

(i) Newspapers or journals of general circulation in the service area of a television station whose programs may be subject to deletion;

(ii) A television station whose programs may be subject to deletion;

(iii) Any television station requesting exclusivity.

[37 FR 3278, Feb. 12, 1972, as amended at 39 FR 33532, Sept. 18, 1974; 42 FR 19347, Apr. 13, 1977]

§ 76.157 Exclusivity contracts.

With respect to each program as to which a television broadcast station licensee or permittee requests exclusivity pursuant to §76.151, such licensee or permittee shall maintain in its public file an exact copy of those portions of the exclusivity contract, such portions to be signed by both the copyright holder and the licensee or permittee, setting forth in full the provisions pertinent to the duration, nature, and extent of the exclusivity terms concerning broadcast signal exhibition (whether over-the-air or by cable) to which the parties have agreed.

§ 76.159 Grandfathering

The provisions of § 76.151 shall not be deemed to require a community unit to delete programming from any signal that was carried prior to March 31, 1972, or that any other community unit in the same community was carrying prior to March 31, 1972: *Provided, however,* That if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart.
[37 FR 3278, Feb. 12, 1972, as amended at 42 FR 13947, Apr. 13, 1977]

§ 76.161 Exception.

The provisions of §§ 76.99 and 76.151 shall not apply to a cable television system having fewer than 1,000 subscribers. Within sixty (60) days following the provision of service to 1,000 subscribers each such system operator shall file a notice to

that effect with the Commission and shall send a copy thereof to all television broadcast stations carried by the cable television system.

[42 FR 19347, Apr. 13, 1977]

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 865, 1284, 1285, 1286--September Term, 1980

(Argued March 19, 1981
Decided June 16, 1981)

Docket Nos. 80-4120, 80-4160, 80-4202, 80-4204

Malrite T.V. of New York, et al.,
Petitioners,

- v. -

Federal Communications Commission, United States of America,
Respondents.

Before:

Newman and Kearse, *Circuit Judges,* and Metzner,* *District Judge.*

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* The Honorable Charles M. Metzner of the United States District Court for the Southern District of New York, sitting by designation.

Petition to set aside a Report and Order of the Federal Communications Commission repealing cable television rules on distant signal carriage and syndicated program exclusivity.

Denied.

Newman, *Circuit Judge:*

In a major reversal of its regulatory policy, the Federal Communications Commission ("FCC" or "Commission") has decided to deregulate cable television by rescinding rules relating to syndicated program exclusivity and distant signal carriage. Television broadcasting and programming interests have petitioned to set aside the FCC's order to reimpose the regulations, which have been in force since 1972. On November 19, 1980, we stayed the order pending the disposition of the appeal. We

now vacate the stay and deny the petition, thereby permitting the exclusivity and distant signal rules to be repealed.

I.

The television broadcasting industry, transmitting video signals free to viewers, is dominated by the three national networks, which contract with local station affiliates to carry network programming, most of which the networks purchase from independent producers. In addition, there are unaffiliated, independent stations which obtain most of their programming in the syndication market.[1] The cable television industry consists of various local systems, which transmit broadcast video signals from a central station to individual homes by closed circuit, coaxial cable. Cable subscribers pay a monthly fee

to receive a basic set of channels plus an optional fee for special channels (pay cable).

Each of the 1,000 broadcasting stations, affiliate or independent, operates along an electromagnetic frequency established by the FCC on either very high frequency (VHF) or ultra high frequency (UHF) channels. The VHF range produces a higher quality viewing signal than UHF for most viewers. Though the FCC had avidly supported the expansion of UHF channels as a means of providing increased program diversity and expression of local interests, UHF stations have been plagued with financial difficulties due to small audiences and low revenues, stemming in part from their inferior reception, and comprise the least profitable sector of the television industry. *See* R. Noll, M. Peck & J. McGowan, *Economic Aspects of Television*

Regulation 79-129 (1973) [hereafter "R. Noll, *et al.*"]; *Revised TV Broadcasting Financial Data-1978*, FCC Memo No. 30037 (July 17, 1980). The networks and their affiliates, which operate primarily in the VHF range, account for the largest audience shares and the vast majority of industry revenues and profits. *See* R. Noll, *et al.*, *supra* at 3-5, 16-18; *Revised TV Broadcasting Financial Data-1978*, *supra*.

Cable television mitigates some of the disadvantages faced by UHF stations by making possible improved reception; to a cable subscriber, the reception quality of a UHF signal is indistinguishable from a VHF signal. But cable provides an additional service by increasing the number of stations available to a viewer through the importation of signals from distant geographic areas using microwave relays or orbiting communications satellites. Cable

increases viewers' program choices, offering greater content and time diversity, and consequently it diverts some portion of the viewing audience away from local broadcast stations to more distant ones.

After an initial period in which the FCC declined to exercise regulatory authority over cable television on the grounds that it did not have jurisdiction under the Communications Act, *see Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958), *reconsideration denied in Report and Order in docket No. 12443*, 26 F.C.C. 403, 428 (1959), the FCC began to regulate the cable industry directly in 1966.[2] *See Second Report and Order in Docket Nos. 14895, 15233 and 15971*, 2 F.C.C.2d 725 (1966). The Supreme Court upheld the FCC's jurisdiction over cable in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), insofar as the particular regula-

tions were "reasonably ancillary" to the Commission's performance of its statutory duties. These 1966 regulations initiated close to a decade of regulation that can fairly be described as hostile to the growth of the cable industry, as the FCC sought to protect, in the name of localism and program diversity, the position of existing broadcasters, and particularly, the struggling UHF stations. *See* Besen & Crandall, *The Deregulation of Cable Television*, 44 Law & Contemp. Prob. 77 (1981); Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 Harv. L. Rev. 1820 (1970). These rules severely restricted the expansion of cable television services by permitting cable operators in the top 100 markets to import distant signals only after showing in an evidentiary hearing that to do so would be in the public interest and not harmful to UHF

broadcast services.[3] While the cable industry continued to grow in the 1960's in spite of these restrictions and other costly operating requirements, such as mandatory program origination, access, channel capacity, and other equipment regulations, it entered the 1970's as a small industry, relegated primarily to rural areas and small communities due in large part to the FCC's policies. Besen & Crandall, *supra* at 79, 93.

In late 1971, the Commission began to consider relaxation of the cable television regulations. *See Commission Proposals for Regulation of Cable Television,* 31 F.C.C.2d 115 (1971) ("Letter of Intent" to Congress). Shortly thereafter, the 1972 regulations emerged from an industry-wide Consensus Agreement negotiated by the White House and the affected industry interests -- broadcasters, cable operators, and pro-

gram producers (copyright owners). *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972). Though the 1972 Rules eased the 1966 restrictions and permitted limited cable expansion, broadcasting interests were still strongly protected. The Report and Order challenged on this appeal, *Report and Order in Docket Nos. 20988 and 21284*, 79 F.C.C.2d 663 (1980) [hereafter "Report and Order"], abolishes the core of the 1972 regulatory structure by repealing the two main methods of broadcaster protection, the distant signal carriage and syndicated program exclusivity restrictions on cable retransmissions.

The distant signal rules, 47 C.F.R. §§ 76.59(b)-(e), 76.61 (b)-(f), and 76.63 (1980), limit the number of signals from distant stations that a cable system can transmit to its subscribers, the limit varying according to market size and the

number of available over-the-air signals within the market. While cable systems are required to carry all local stations (defined as within 35 miles of the cable system's community), the number of distant signals that they can carry is limited as follows: in the top 50 markets, cable systems can make available a total of 3 network stations and 3 independents; in the second 50 markets, 3 networks and 2 independents; in the smaller markets, 3 networks and 1 independent; 2 "bonus" independent signals can be carried in major markets where local signals fill the allotted cable complement. By limiting the number of distant signals, the FCC sought to lessen potential adverse impact on the audience shares of local stations, a policy which has the additional effect of lessening the attractiveness of cable to potential subscribers.[4]

The syndicated program exclusivity rules, 47 C.F.R. §§ 76.151-76.161 (1980), authorize a local television station, which has purchased exclusive exhibition rights to a program, to demand that a local cable system delete that program from distant signals, whether or not the television station was simultaneously showing, or ever planning to show, the program. Copyright holders, in addition to broadcasters, are also protected by the rules and can require deletion of their programs from cable systems. The extent and duration of this protection varies according to market size, program type, and time of showing, with the greatest protection afforded to stations located in the largest markets.[5] Cable operators are allowed to substitute other distant signals when they have to delete a program under these rules.

These 1972 rules were fashioned in the

context of a continuing policy debate as to whether cable operators should face copyright liability for the programs they retransmitted to subscribers. Prior to Congress's revision of the copyright laws in 1976, the Supreme Court had consistently held that cable systems were not liable under the copyright laws for their use of copyrighted broadcast programs without the owner's consent. *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). As a result of these rulings, while the broadcasting industry spent billions of dollars to create and purchase programming,[6] cable operators could retransmit those programs at their operating cost without making any payments to program suppliers. Losing in the courts, broadcasters sought FCC protection from what

they alleged was a situation of "unfair competition" by cable systems. The FCC rules restricting cable operators' ability to carry distant signals and syndicated programs served, in effect, as proxies for the copyright liability the courts had refused to impose, by restricting cable systems in their use of copyrighted works. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 176-77, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5792-93; Comment, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, 69 Calif. L. Rev. 527, 536-44 (1981). Indeed, the revision of the cable television rules in 1972 pursuant to the industry-wide compromise was undertaken with a view toward facilitating enactment of legislation imposing copyright liability on cable operators. *See Commission Proposals for Regulation of Cable Television, supra,* 31

F.C.C.2d at 115-16; *Geller v. FCC*, 610 F.2d 973, 974-75 (D.C. Cir. 1979) (*per curiam*).

The situation changed, however, in 1976, when Congress adopted a system of partial copyright liability for cable television with a compulsory licensing scheme. 17 U.S.C. § 111 (1976). Under the new Copyright Act, cable operators are expressly permitted to retransmit programs without any need to obtain the consent of, or negotiate license fees directly with, copyright owners, but in return they must pay the owners a prescribed royalty fee, based on the number of distant signals the system carries and its gross revenues. *Ibid. See generally Nimmer on Copyright*, § 8.18[E] (1980). After Congress had resolved the copyright issue by a system of compulsory licensing, the FCC commenced an inquiry into the need for maintaining its copyright surrogates, the distant signal and syndi-

cated exclusivity rules. *Notice of Inquiry in Docket No. 20988,* 61 F.C.C.2d 746 (1976) (announcing review of desirability of syndicated exclusivity rules); Notice of Inquiry in Docket No. 21284, 65 F.C.C.2d 9 (1977) (announcing sweeping review of economic relationship between cable and broadcast television industries).[7] These inquiries resulted in two extensive staff reports advocating elimination of the rules, *Report in Docket No. 20988, Cable Television Syndicated Program Exclusivity Rules,* 71 F.C.C.2d 951 (1979), and *Report in Docket No. 21284, Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television,* 71 F.C.C.2d 632 (1979) [hereafter "Economic Inquiry Report"]. After considering several econometric and case studies concerning the impact of cable television on local station audiences and future cable penetration

rates, the Commission found that the impact on broadcasting stations from the deregulation of cable television would be negligible, and that consumers would be decidedly better off due to increased viewing options from the greater availability of expanded cable services.

In conjunction with the release of these reports, the FCC initiated an informal notice-and-comment rulemaking proceeding to eliminate the distant signal and syndicated exclusivity restriction. *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284,* 71 F.C.C.2d 1004 (1979). After widespread public comment and administrative reevaluation, it issued the Report and Order, which adopted the proposal for repeal with three commissioners dissenting in whole or in part. The FCC also rejected a suggestion of the National Telecommunications and Information Administration (NTIA)

of the United States Department of Commerce that it impose a "retransmission consent" requirement on cable systems if it eliminated the distant signal and syndicated exclusivity rules. Under that proposal, cable operators would need the consent of the originating broadcast station before they could transmit non-network programming to their subscribers.[8] Both the United States Department of Justice and the United States Copyright Office opposed the NTIA proposal as contrary to Congress's mandate of a compulsory licensing system for cable television under the new Copyright Act, and the FCC adopted their view.

II.

Petitioners challenge the Commission's Report and Order, among other grounds, for seriously misconstruing the mandate of the

1976 Copyright Act and for being arbitrary and capricious. We conclude that a fair reading of the Copyright Act supports the FCC's position and that the FCC's action was neither arbitrary nor capricious. While the deregulation of the cable television industry raises serious policy questions, evidenced by the sharp division within the Commission as to the conclusions of the Report and Order, these questions are best left to the agencies that were created, in large part, to resolve them.

FCC Authority Under the Copyright Act

Petitioners' substantive argument concerning the FCC's interpretation of its regulatory authority over cable television under the Copyright Act is two-pronged: (1) that the Act's compulsory licensing system was premised on maintenance of the existing

regulatory framework and (2) that the Act does not prohibit adoption of a retransmission consent requirement. These claims are based on passages in the Act and its legislative history, allegedly indicating Congress's intention to leave the FCC with free rein to readjust inter-industry relations by regulation. Specifically, petitioners refer to the provision establishing the compulsory license, § 111, which premises the license upon the "carriage of signals . . . permissible under the rules, regulations, or authorizations of the Federal Communications Commission." 17 U.S.C. § 111(c)(1). Petitioners contend that this language implied both that the FCC cannot upset the existing framework restricting the amount of programming cable systems can carry, and that the Commission can adopt rules conditioning cable retransmission upon receipt of broadcaster con-

sent, as the NTIA proposed, because the compulsory license covers only signals the FCC permits cable systems to carry pursuant to Commission rules. Petitioners further rely on a passage in the report of the House Judiciary Committee, which stated that the Committee did not intend to "interfere" with FCC rules or communications policy, and that the FCC should neither read the copyright legislation to touch on issues such as increased distant signal carriage, nor rely on it to enact any significant changes in the existing "delicate balance" of regulation in areas where Congress had not resolved the issue. H.R. Rep. No. 1476, *supra* at 89, [1976] U.S. Code Cong. & Ad. News at 5703-04. From these glimmerings of legislative intent, petitioners contend that the legislative scheme will not tolerate repeal of the distant signal or syndicated exclu-

sivity rules, but will accept a retransmission consent requirement.

We reject both contentions. Though Congress was aware of the underlying regulations restricting cable transmissions when it adopted the compulsory licensing system, it also recognized the legitimacy within the statutory plan of FCC modifications of that regulatory structure. Congress provided that the Copyright Royalty Tribunal ("Tribunal"), the entity established to collect and distribute the royalty fees, could readjust the statutory royalty rate if the FCC altered either the distant signal or syndicated program exclusivity rules. 17 U.S.C. 801(b)(2)(B) and (C) (1976). The plain import of §§ 801 is that the FCC, in its development of communications policy, may increase the number of distant signals that cable systems can carry and may eliminate the syndicated

exclusivity rules, in which event the Tribunal is free to respond with rate increases.

The views expressed in the House Report do not call for a different construction. Though perhaps revealing concern for congressional etiquette among the several committees with overlapping jurisdiction over the regulated subject matter, the comments do not foreclose the FCC's decision to repeal the distant signal and exclusivity rules. In repealing its rules, the FCC has heeded the Committee's caution against using the 1976 copyright legislation to determine matters that Congress "did not resolve." The FCC did not base its repeal of the cable regulations solely upon the revision, but upon a careful reassessment, in light of all the evidence, of the gains and losses to the public interest from deregulation.

While the Commission is not obliged by the Act to preserve existing rules, it is not free to adopt a new one that would be inconsistent with a basic arrangement of the new legislation. Retransmission consents would undermine compulsory licensing because they would function no differently from full copyright liability, which Congress expressly rejected. Under the NTIA proposal cable operators would be forced to negotiate individually with numerous broadcasters and would not be guaranteed retransmission rights, a scenario Congress considered unworkable when opting for the compulsory licensing arrangement.[9] H.R. Rep. No. 1476, *supra* at 89, [1976] U.S. Code Cong. & Ad. News at 5704; *see* Comment, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, *supra* at 550. A rule imposing a retransmission consent requirement would also directly

alter the statutory royalty formula by precipitating an increase in the level of payments of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme for both the specific compensatory formula and the appropriate forum for its adjustment. In an era of compulsory copyright licensing,[10] we find it difficult to imagine that Congress intended its formula for royalty fees to be only a minimum subject to FCC alteration, since it delegated broad discretionary authority to the Tribunal, and not the FCC, to readjust the rates if regulatory action so required. Congress did not specifically set the royalty rate for other types of compulsory licenses established under the new Act. *See* 17 U.S.C.§ 118(1976) (public broadcasting royalty rates set by Tribunal). To hold that the compulsory license formula

sets only a minimum, and not a maximum rate (subject to Tribunal adjustment), would undermine the carefully established legislative arrangement.[11]

Review of the FCC's Rulemaking Process

Apart from arguments based on the Copyright Act, petitioners contend that the FCC's determination to repeal the cable television regulations should be set aside as arbitrary and capricious. 5 U.S.C. § 706(2)(A) (1976). The scope of judicial review of informal rulemaking under the Administrative Procedure Act is circumscribed. Though a reviewing court is to be "searching and careful" in its inquiry to ensure that the agency has articulated a "rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), it cannot substitute

its judgment for that of the agency. *Citizens to Protect Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

The Report and Order repealing the cable television regulations followed several years of thorough study by FCC staff and extensive public commentary, both before and after reports of findings were issued in 1979. Numerous econometric studies, as well as case studies of existing markets where cable systems had been less strictly regulated because of "grandfathering" provisions in the FCC regulations,[12] were carefully evaluated in reaching the administrative decision. Petitioners challenge the FCC's use of the vast material compiled in the proceeding as biased and irrational, contending that the FCC's conclusion that broadcasting stations would not be injured from cable deregulation was unfounded, and that the FCC failed

to consider fully, or impartially, data projecting its decision's adverse economic impact on station finances and program supply. For example, the professional sports leagues claim the Commission did not consider the effect of deregulation on sports programming; the independent television stations charge it with viewing the industry as a whole, thereby ignoring the adverse impact on independents; and American Broadcasting Companies, Inc. ("ABC") contends that the FCC failed to consider the effects of deregulation upon different groups of viewers.

The FCC specifically responded to petitioners' factual and theoretical assertions in the Report and Order, articulating clear reasons when it rejected, or did not fully use, the economic predictions in industry studies due to erroneous assumptions or modeling

flaws. *E.g., Economic Inquiry Report, supra,* 71 F.C.C.2d at 677-78 (rejecting certain results of Wharton Econometric Forecasting Associates study for National Association of Broadcasters because it used a formula that biased results toward smaller independent stations), reasserted in *Report and Order, supra,* 79 F.C.C.2d at 696. It commissioned an outside economist to reanalyze the data in his study, one on which the FCC's 1979 reports relied, after incorporating industry criticisms of his techniques; his results were unchanged. Appendix B, *Report and Order, supra,* 79 F.C.C.2d at 827 (Rand Note, prepared for FCC by R. Park). The Report and Order thus reasserted the 1979 reports' conclusion that unregulated cable television would divert less than ten per cent of local station audiences, a result that would have only a slight effect on broadcasting

industry revenues and the supply of programming. We cannot conclude that this finding was arbitrary or capricious. The Commission offered a rational explanation for its policy founded on a predictive judgment well within its authority. *See FCC v. WNCN Listeners Guild*, ____ U.S. ____, 49 U.S.L.W. 4306 (Mar. 24, 1981).

Nor do we think the FCC assigned too little significance to, or overlooked, any of the contentions by any of the pertinent segments of the industry. While independent stations are less profitable than network affiliates, there were data indicating that local affiliates were subject to greater audience diversion than independents, *e.g.*, R. Noll, *et al.*, *supra* at 162-69, that UHF stations, most of which are independent, benefited from cable television in terms of improved viewing quality, *e.g.*, *id.* at 166, and that independent

stations in the grandfathered markets prospered, *Economic Inquiry Report, supra,* 71 F.C.C.2d at 698-701. Though in the past the FCC has accorded special treatment to UHF stations, it is not required to do so when in its judgment the public interest would be disserved; the FCC's statutory directives are to promote a "rapid, efficient" nationwide communications service and to encourage its use in the "public interest," 47 U.S.C. §§ 151, 303 (1976), neither of which commands a specific industry structure or protection of any particular stations from financial difficulty or even failure. Moreover, the FCC reviewed the circumstances of broadcast stations that filed comments alleging current or potential injury from cable television and found that cable had not adversely affected those stations. *Economic Inquiry Report, supra,* 71

F.C.C.2d at 711. The concerns of independent broadcasters were adequately considered by the FCC and did not require retention of either set of rules.

The independent stations further maintain that the FCC should have grandfathered existing syndicated program exclusivity contracts. The FCC was not required to take such action upon elimination of the exclusivity rules. The property of regulated industries is subject to such limitations as may reasonably be imposed in the public interest, and consequently, as numerous courts have recognized, regulations may be adopted that abolish or modify preexisting interests. For example, in *General Telephone Company of the Southwest v. United States*, 499 F.2d 846, 863-64 (5th Cir. 1971), FCC rules were upheld requiring telephone companies to divest their interests in cable television

systems; in rejecting a grandfathering claim, the Court stated that the FCC should not be limited to building on the status quo when seeking to impose a regulatory policy. Moreover, in deciding not to grandfather existing exclusivity rights, the Commission considered evidence indicating that these exclusivity rights were rarely asserted.

The sports programming issue was not as thoroughly reviewed by the Commission in the preliminary stages of the rulemaking process as other issues, such as the effect on independent stations, because no change in the primary means of sports program protection, the home broadcast black-out rules, 47 C.F.R. § 76.67 (1980), was ever contemplated. However, the Commission did respond to the sports leagues' comments in the Report and Order. The leagues contend that cable television, by making available

more broadcasts of games from distant cities when a club is playing at home, will decrease gate receipts, threaten the league concept by hurting weaker franchises, and ultimately lead to less sports programming. But the leagues did not produce any evidence that the number of sports broadcasts by home clubs has been reduced in the existing areas of high cable penetration, or would be reduced in the future. Further, as the FCC noted, many variables besides the availability of sports programming on television influence gate attendance, such as the weather and the caliber of the home and visiting teams. It was not arbitrary for the FCC to conclude that sports programming requires no special protection after the repeal of the distant signal rules.

Finally, the FCC's action is not deficient, as ABC contends, for lack of precise assessment of the impact of repeal on discrete groups of viewers. While the FCC did not conduct detailed demographic studies of cable and noncable television audiences, this fact does not lessen the validity of its conclusion that deregulation is in the public interest. Though lower-income families benefit more from a system of free television than from cable television, *see* R. Noll, *et al.*, *supra* at 25-26, the expansion of cable services was reasonably found not to threaten the basic nature of free television. Given current and estimated cable penetration rates and the profitability of the broadcasting industry, we do not doubt the reasonableness of the FCC's conclusion that programming on free television will not substantially change or diminish after deregulation.[13] If free

television retains its existing programming, then there is an increase in overall consumer welfare and no significant inequity among groups of viewers from the FCC's decision: those who do not purchase cable are substantially unaffected in their viewing patterns, while those who do, being able to pay for programming, some of which does not generate sufficient mass appeal to be aired on free television, receive a service more responsive to their viewing preferences. *See id.* at 136.[14]

Ultimately, the task in adopting rules to achieve the appropriate mix between broadcast and cable services requires determining a desired tradeoff between the inefficiency of the pricing system of cable television and the inadequacy of programming under free television.[15] Since the marginal cost of programs for an extra viewer is zero, any price paid by a cable

subscriber for receiving television signals is inefficient.[16] Though free television is price efficient, because advertisers and not viewers pay for programming, the pricing does not reflect the intensity with which viewers prefer to see certain types of shows. *See* Spence & Owen, *Television Programming, Monopolistic Competition and Welfare,* 91 Q.J. Econ. 103 (1977). Free television consequently limits program diversity by its concentration on mass audience shows, which make advertising worthwhile. In shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity, a valid FCC regulatory goal, *see FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 795-97 (1978); *United States v. Midwest Video Corp.,* 406 U.S. 649,669 (1972)

(plurality opinion). While there will undoubtedly be more of the same type of mass audience programming now populating the national networks on cable channels as well, the unlimited number of cable channels holds out the best possibility for special interest programming. As the market shares for mass audiences are divided up among the several stations, programming will be purchased to capture the next largest share, selective audiences, *see* R. Noll, *et al.*, *supra* at 151; Spence & Owen, *supra*, and programs will be supplied when revenues exceed cost and not only when a specific audience size is attained, as under the advertiser-supported system.

The Commission's repeal of the distant signal and syndicated exclusivity rules, after widespread participation of all industry segments and comprehensive evaluation of technical data, reflects the

"rational weighing of competing policies" Congress intended to be exercised by the agency and to be sustained by a reviewing court.[17] *See FCC v. National Citizens Committee for Broadcasting, supra,* 436 U.S. at 803.

Burden of Proof in the Proceedings

Petitioners raise one futher contention that merits attention. They argue that the FCC impermissibly shifted the burden of proof in its rulemaking proceeding to those parties seeking retention of the regulations. We disagree. After an extended inquiry into the effect of the existing regulations and the state of the industry that encompassed several years of investigation, and thorough consideration of the vast material compiled, the FCC concluded that the existing regulations should be repealed. Only after receiving

that evidence did the FCC ask members of the public who disagreed with its findings to produce data showing how they would injured by deregulation since it had not found any evidence to that effect. Such action did not reverse the burden of proof because the FCC had already produced an overwelming mass of evidence supporting elimination of the rules. Rather, its request for data, evincing a desire for widespread participation from all interested segments of the public who might be aware of information that the agency's intensive inquiry did not uncover, reflects the proper exercise of reasoned decision-making.

The petition to set aside the Report and Order is denied.

1 Syndicated programming, supplied by independent producers, consists of either programs previously broadcast on network stations or newly produced programs. Unlike network programming, simultaneous broadcasting of syndicated programming is infrequent because the independent stations do not all purchase the same programs. *See* Besen, Manning & Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. & Econ. 67,77 (1978).

2 The Commission began regulating the cable industry indirectly as early as 1962, when it denied a request for a permit by a common carrier to install microwave relays to carry signals for a cable telvision system. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. cir.), *cert. denied*, 375 U.S. 951 (1963). The Commission held that granting the permit, though improving the cable system's service its subscribers, was not in the public interest because it would adversely affect the economic operation of a local broadcast station.

3 There are about 200 television markets in the United States. Eighty-six percent of the approximately 74 million television households are located in the top 100 markets; 33 percent are in the top 10 markets. *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284*, 71 F.C.C.2d 1004, 1011 (1979). About one-third of all television households have access to cable service, and about 19 percent of all television households suscribe. *Id.* at 1013-14. The house-

holds for which a cable connection is available are located primarily outside of the major metropolitan markets. *Report in Docket No. 21284, Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television,* 71 F.C.C.2d 632, 664-65 (1979) [hereafter "Economic Inquiry Report"].

4 One of the major reasons for subscribing to cable is the access to more programming. Consequently the penetration rate, that is, the per cent of households subscribing of those with access to the system, varies with the number of signals imported. Several economic studies have estimated the value of additional signals to viewers, and, in general, conclude that carriage of four distant independent signals increases cable penetration rates by an average of at least 9 percentage points *See Economic Inquiry Report, supra,* 71 F.C.C.2d at 670. For specific calculations *see, e.g.,* Charles River Associates, Inc., *An Analysis of the Demand for Cable Television* 47 (1973); R. Noll *et al., supra* at 277-78.

5 For example, in the top 50 markets, at the request of a local station, cable operators must delete all syndicated programs under exclusive exhibition contract to the requesting station, regardless of when the program is scheduled for showing on the local station, and program copyright owners can request deletion for one year after the first syndicated sale of the program, even if no local station has the rights to exhibit it. In the second 50 mar-

kets, distant syndicated programs need not be deleted if broadcast in prime time unless the requesting local station is also planning to air the program in prime time, and exlusivity rights expire at specified time periods or on the occurrence of specified events, depending on the nature of the program, e.g., first-run syndicated series and feature films are protected for two years while reruns of network series are protected for only one year. Only systems in the top 100 markets are subject to these rules.

Though much less comprehensive in coverage, exclusivity rules exist for network programming. Duplication of network programming is prohibited with respect to simultaneous showings. 47 C.F.R. §§ 76.92-76.99 (1980). The duration of network program protection is more limited than that for syndicated programs in part due to the different methods of distribution. Unlike network programs, which are shown at the same time on virtually all affiliates as they come over the air, with exceptions for stations in different time zones that involve program retaping, syndicated programs are shown at separately-scheduled, diverse time by each purchasing independent station. Moreover, cable systems may not carry more than three network signals, which reduces the possibility of duplication of local affiliate programming, whereas they can carry several independent signals, which increases the likelihood of a syndicated program being duplicated. The network nonduplication rules, as well as rules requiring the blacking out

of certain live sports programs, 47 C.F.R. § 76.67 (1980), are not altered by the Report and Order challenged on appeal, though petitioners Commissioner of Baseball, National Football League, National Basketball Association, and National Hockey League, and intervenors American Broadcasting Companies, Inc., and Jet Broadcasting Company, Inc., contend that repeal of the distant signal and syndicated exclusivity rules will decrease the effectiveness of the network and sports programming regulations.

6 For instance, in 1977, total production costs of the three networks and all television stations were $2,878 million, and the cost of packaged programs, that is, the expenses of purchasing programs from independent producers, was $1,482 million. *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284, supra,* 71 F.C.C.2d at 1018; *see generally* R. Noll, *et al., supra* at 63-79.

7 This reevaluation was further prompted by *Geller v. FCC, supra,* 610 F.2d at 980, which required the FCC to review the necessity of retaining the syndicated exclusivity rules.

8 The NTIA proposal would have required consent for only new and expanding cable systems and would have grandfathered existing systems because they were built on the basis of either no or partial copyright liability. On this appeal petitioners do not seem to envision such a limited retransmission consent rule, though their arguments are not directed to the content of such a regulation but

rather to the FCC's ability to impose a consent requirement in general.

9 The FCC's experiment with a retransmission consent approach to the problem bears out Congress's concerns. In 1968 the FCC suspended the hearing process required by its 1966 rules in favor of compliance with then proposed rules requiring cable systems in the top 100 markets to obtain consent from distant stations before transmitting their signals. *Notice in Docket No. 18397*, 15 F.C.C.2d 417 (1968). This experiment resulted in virtually all denials of retransmission rights, leading the period to be known as the "freeze" on cable growth. *See Economic Inquiry Report, supra*, 71 F.C.C.2d at 651. There would be little difference as to feasibility considerations whether consent had to be obtained from program producers, which was Congress's focus, or broadcast stations.

10 The 1976 Copyright Act provided for blanket licensing in several contexts in addition to cable television. *See* 17 U.S.C. § 116 (1976) (juke boxes); *id.* § 115 (mechanical royalties); *id.* § 118 (public broadcasting).

11 Because we find that the FCC's rejection of a transmission consent requirement was based on a proper construction of the Copyright Act, we do not reach petitioners' further contentions that such a requirement, if not prohibited by the Copyright Act, would be permissible under the Communications Act, 47 U.S.C. § 151 *et seq.* (1976).

12 Under 47 C.F.R. §§ 76.65 and 76.99 (1980), the regulations regarding distant signal and syndicated exclusivity, respectively, were made inapplicable to signals being transmitted by cable systems prior to March 31, 1972.

13 As in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) *(per curiam), cert. denied,* 434 U.S. 829 (1977) (vacating FCC rules restricting pay cable showing of certain feature film and sports programming), there was no significant evidence presented of program siphoning.

14 Although in a system of only pay television (whereby the viewer pays per program or per channel, and not simply a cable subscription and installation fee) the distrIbutional effect would be to shift income from consumers to the television industry; under a cable system consumers under a cable system consumers gain, and it is the broadcasting network segment that loses due to increased competition from independent stations. R. Noll, *et al, supra* at 135, 173-74, 182.

15 The bulk of the empirical data supports the FCC's position that deregulation will have only a negligible adverse impact on broadcast programming, but plausible economic arguments can be and were made on both sides. Because television is in the nature of a "public good," that is, an increase in the amount available for consumption by one viewer does not reduce the amount available for consumption by other viewers, the marketplace may not produce

the optimal mix of programming. *See* Besen, Manning & Mitchell, *supra* at 13; Samuelson, *Aspects of Public Expenditure Theories*, 40 Rev. Econ. & Stat. 332 (1958); Samuelson, *The Pure Theory of Public Expenditure*, 36 Rev. Econ. & Stat. 387 (1954). The distant signal and syndicated exclusivity rules, in the absence of full copyright liability for cable operators, could function to avoid the problems involved in the private production of a public good like television, by excluding nonpurchasers, who would otherwise be able to enjoy a "free ride" by freely consuming the good and letting others pay for it. *See* Demsetz, *Private Production of Public Goods*, 13 J.L. & Econ. 293 (1970). Economists differ over the effect of eliminating these rules on the supply of programming, and consequently, on the gains in public welfare from pursuing such a regulatory policy. *Compare* R. Noll, *et al.*, *supra* at 66-67, 149 (program supply will not be affected because producers currently receive excessive rents, and may even increase with expansion of cable) *and* Spence & Owen, *Television Programming, Monopolistic Competition and Welfare*, 91 Q.J. Econ. 103 (1977) (program supply will increase from larger market given relatively unlimited channel capacity of cable), *with* Besen, Manning & Mitchell, *supra* at 81, 85 (program supply will be reduced because program producers cannot collect full value of their work).

16 In economic terms, price equals marginal cost in competitive equilibrium. *See generally* W. Nicholson, *Microeconomic Theory* (2d ed. 1978).

17 As one commentator has noted, the more the question of agency choice comes to resemble a political process, weighing the claims of competing interest groups, the less apparent justification for judicial supervision of Congress's delegation of choice to the agency. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1787 (1975).